Office Supreme Court, U.S.
FILED
MAY 8 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1082

STATES MARINE LINES, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA and ISBRANDTSEN COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HERMAN GOLDMAN,
ELKAN TURK,
ELKAN TURK, JR.,
SOL D. BROMBERG,
120 Broadway,
New York 5, N.Y.,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner herein respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review a decision and order of that Court.

Opinion Below

The opinion and order of the court below has not yet been officially reported. Said opinion and order is printed as Appendix A to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under §10 of the Act of December 29th, 1950, 64 Stat. 1132 (5 U.S.C. §1040), and under 62 Stat. 928 (28 U.S.C. §1254 (1)). This petition is timely, the order of the court below having been entered on January 3, 1961 and an order of that court denying petition for rehearing having been entered on February 7, 1963.

The Questions Presented

Isbrandtsen Co., Inc. (hereinafter referred to as "Isbrandtsen"), a non-conference carrier, booked a quantity of cotton belonging to H. Kempner for transportation to Japan. Being unable to charter a vessel on satisfactory terms for the performance of its obligation, Isbrandtsen rebooked the cotton in its name as shipper on vessels of States Marine Lines, Inc. (hereinafter referred to as "SML"), a member of the Far East Conference of steamship lines.

The Far East Conference for many years has employed a contract rate system under which one scale of rates is charged to shippers who do not contract to patronize vessels of conference members exclusively, and a lower scale is charged to shippers who do so contract. Neither Isbrandtsen nor Kempner was a contract shipper. Isbrandtsen sought a Far East Conference contract from SML but was advised that application therefor must be made to the conference office. Isbrandtsen did not so apply. SML also advised Isbrandtsen that even if it had a contract, the contract

rates would not apply to a shipment of goods which were not Isbrandtsen's, but were goods of a non-contract shipper. SML charged, and Isbrandtsen paid the non-contract rate on the shipments.

The Federal Maritime Commission sustained Isbrandtsen's claim for reparation but denied pre-judgment interest. SML sought review of the award of reparation and Isbrandtsen of the denial of interest. The Court of Appeals decided both questions in favor of Isbrandtsen.

Under the foregoing circumstances the following questions are presented:

1. Whether a non-Conference carrier can obtain a Conference shipper's contract in its own name and ship thereunder at contract rates, as its own, the merchandise of non-contract shippers who, when convenient, ship the remainder of their merchandise by non-Conference carriers at cut rates;

2. Whether any person who has no interest in the cargo shipped or in its marketing or sale and who suffers no loss or injury by way of lost sales or sale at reduced prices and who is not in competition with other dealers in the same or similar commodities can be adjudged to have suffered unjust discrimination under §17 of the Shipping Act, 1916, as amended;

3. Whether a Conference carrier can be held to have discriminated against a non-contract shipper when it has charged that shipper freight at the established non-contract rate because on four previous occasions some other members of the Conference have carried goods of the same shipper at contract rates;

4. Whether, assuming that a Conference carrier has unjustly discriminated against a shipper, such shipper can establish a claim for reparations by a mere proof that it paid freight at a higher rate than others paid for the transportation of the same or a similar commodity without the establishment of a competitive relationship between that shipper and the favored shippers and without proof of the amount of the injury suffered in the sale and marketing of the commodity carried;

5. Whether the Court of Appeals exceeded its power in overriding the FMC's discretionary refusal to award interest for the period prior to the award of reparation without in any way impugning the FMC's exercise of discretion;

6. Whether the Court of Appeals erred in denying to SML the full scope of the review to which it was entitled by sustaining the following holdings of the Federal Maritime Commission as findings of fact supported by substantial evidence rather than reviewing the same under the criteria applicable to administrative conclusions of law: (a) that SML unjustly discriminated against Isbrandtsen; and (b) that Isbrandtsen would have been entitled to the contract rate on these shipments if it had a contract, notwithstanding Article 11 thereof;

7. Whether the Court of Appeals exceeded its authority in finding, contrary to the fact, that the FMC had accused SML of acting in bad faith and stating its agreement with such erroneously assumed finding.

Statutory Provisions Involved

The statutory provisions involved, §§17 and 22 of the Shipping Act, 1916, 39 Stat. 728 as amended (46 U.S.C. §§816 and 821), Review Act of 1950, 64 Stat. 1132 (5 U.S.C. §1040) and 62 Stat. 928 (28 U.S.C. §1254(1)), are printed in Appendix B to this petition.

Statement of the Case

SML is a common carrier by water and a member of the Far East Conference (hereinafter referred to as the "Conference"). The Conference is a group of common carriers by water who, pursuant to Federal Maritime Commission[1] Agreement No. 17, as amended, which has been duly approved by the FMC under §15 of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §814), establish tariffs of rates which the members agree to charge for the transportation of property from United States Atlantic and Gulf Ports to various countries in the Far East, including Japan (J.A. 23).

Since 1929, the Conference has employed a contract rate system. Under this system rates are established

[1] Pursuant to Reorganization Plan No. 7 of 1961 (H. Doc. 187, 87th Cong., 1st Sess.; note following §1111 of Title 46, U.S.C.A.), in accordance with the Reorganization Act of 1949, 63 Stat. 203, as amended (5 U.S.C. §§133z to 133z-15), the Federal Maritime Board, which made the Order under review, was abolished on August 11th, 1961, and all of its functions under the Shipping Act, 1916, 39 Stat. 728, as amended (46 U.S.C. §§801, *et seq.*), so far as here material, were transferred to the Federal Maritime Commission which was created by the Reorganization Plan. The Federal Maritime Commission and its predecessors are hereinafter, wherever it is appropriate to do so, referred to as the "FMC".

at two levels for all tariff items included in the system. The higher level is applied to cargoes of shippers who have not signed contracts to forward all of their shipments within the coverage of the contract by vessels of conference members, and the lower level is applied to the cargoes of shippers who have so contracted (J.A. 21, 22). This was the system considered by this Court in *Far East Conference* v. *United States*, 342 U.S. 570 (1952). Raw cotton in bales has, at the request of substantially all shippers of the commodity, been included in such contract system since February 7, 1950).

In November, 1952, Isbrandtsen filed with the FMC a complaint against the FEC and all of its member carriers. The complaint sought an order directing that the Conference cease from using the contract rate system and directing SML to pay to Isbrandtsen $5,455.00 with interest by way of reparation.

Isbrandtsen, although primarily a carrier, also acts as a merchant. Isbrandtsen alleged that it was refused the right to enter into a shipper's contract and therefore was required to pay for the transportation of cotton from United States Gulf Ports to Ports in Japan at the higher non-contract rate. The damages were based upon the difference between freight computed at the non-contract rate which it paid, and freight at the contract rate, *i.e.*, a difference of $.20 per hundred pounds (J.A. 11-20).

Isbrandtsen did not own or have any interest in the cargo which it shipped or in the sale or marketing thereof, and was not concerned with any profits which might be realized or losses which might be suffered on the sale thereof. The cotton belonged to one

Kempner, who was not a contract shipper (J.A. 35-36a). Isbrandtsen had contracted with Kempner to transport this cotton to Japan at a rate which was 10% less than the Conference contract rate.

Isbrandtsen had intended to transport the Kempner cotton by a vessel which it expected to charter from a third party at a rate of charter hire low enough to yield Isbrandtsen a profit at its lower rate. Being unable to find a vessel which could be chartered at a rate which would show a profit, Isbrandtsen booked the cargo in its own name on vessels of SML (J.A. 51-52).

Isbrandtsen had in the past held a Conference contract for such goods as it exported as a merchant. Its contract had expired prior to this shipment (J.A. 101, 104). Upon being informed by SML's Houston branch office that it was not listed as a Conference contract shipper, Isbrandtsen requested that SML's Houston office furnish it a form. SML informed Isbrandtsen that the form could only be obtained from the Conference office in New York City. Isbrandtsen, whose head office is in New York City, did not apply to the Conference until months after the cargo had moved, and then was promptly given a contract.

Isbrandtsen was also informed that even if it had a contract, the cotton could not be carried on vessels of a Conference member at the contract rate because the title and true ownership of the cotton were held by a non-contract shipper, Kempner, one of the largest shippers in the trade (J.A. 32-35, 38-41, 43, 44, 59, 60, 63-90, 98). The Conference's form of shipper's

contract in use in 1952 contained the following Article 11 (J.A. 28a):

> "14. It is agreed that the party herein referred to as the Shipper is not the agent or broker for any principal, whether disclosed or undisclosed, and that no party who is not named herein or at the foot hereof shall have any rights as Shipper by virtue hereof."

The FMC found that the Conference had denied Isbrandtsen a shipper's contract and that SML had unjustly discriminated against Isbrandtsen by charging it the non-contract rate for the cotton shipments involved, whereas some other members of the Conference, under circumstances which do not appear in the record, had carried shipments of other commodities for Isbrandtsen shortly before August, 1952, at contract rates even though Isbrandtsen was not then a contract shipper (J.A. 119 *et seq.*).

On the unprecedented theory that SML discriminated against Isbrandtsen because other carriers, under undisclosed circumstances and with respect to other tariff items, had preferred it, the FMC awarded reparation to Isbrandtsen in the amount of the difference between freight on the cotton shipments at the non-contract rate and freight computed at the contract rate. The opinion of the Court below indicates that the FMC based its holding of unjust discrimination on the denial of a shipper's contract. The Court also observed (App. A, p. 4) that the FMC had found that SML exercised bad faith in refusing to furnish to Isbrandtsen a Conference Shipper's Contract, and the Court indicated its approval of that finding. The FMC did not so find, and if it had done so, there is nothing in the record to support a finding to that effect.

The FMC held the contract rate system lawful and neither Isbrandtsen's petition for review nor the decision of the Court below challenges that holding.[2]

Reasons for Granting the Writ

I. The Questions Involved Are Of Paramount Public Importance Because The Decision Below Would Frustrate The Stated Purpose Of P.L. 87-346 And The Public Benefits Which Were The Objects Of That Law.

The decision below will have infinitely more widespread consequences for trade and transportation in United States foreign commerce than the modest reparation issue might suggest. After years of litigation culminating in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958), the validity of contract rate systems in 60 U.S. trade routes was thrown into doubt. The dissenting opinion of Mr. Justice Frankfurter stated, in effect (356 U.S. at 500-501), that the majority decision had outlawed all contract rate systems in the foreign commerce of the United States. Both the House and Senate Committees which considered the bills which later became P.L. 85-626, 72 Stat. 574, felt that there was sufficient doubt as to the legality of any of the contract rate systems then in use to require remedial legislation. H.R. Rep. No. 2055, 85th Cong., 2d Sess. (1958), and Sen. Rep. No.

[2] However, in an unrelated review proceeding initiated by parties whose complaints to the FMC were adjudicated on the same administrative record, the court below held the FEC contract rate system to have been unlawful for want of the approval required by *Isbrandtsen Co.* v. *U.S.*, 93 App. D.C. 293, 211 F. 2d 51 (1954), cert. denied *sub nom.*, *Japan-Atlantic & Gulf Conf.* v. *United States*, 347 U.S. 990 (1954). The Conference will, within the prescribed period, file a petition for a writ of certiorari to review that conclusion.

1709, 85th Cong., 2d Sess. (1958). In order to prevent the eruption of chaotic rate wars during the period required for thorough study, Congress enacted P.L. 85-626; 72 Stat. 574, protecting existing contract rate systems for a stated period, enlarged by P.L. 86-542, 74 Stat. 253, P.L. 87-75, 75 Stat. 195, and P.L. 87-252, 75 Stat. 521.

For three years the shipping industry was thoroughly investigated and the views of merchants were recorded. In 1961 the conclusion reached was the same as that which had been the predicate for the Shipping Act, 1916. Both common carriers by water and merchants trading over long distances between nations require long-term stability of ocean freight rates. The former require it in order to maintain and replace the ever-improving fleets rendering common carrier service; and the latter require stability in order that they may safely buy and sell months in advance of shipment without becoming gamblers on ocean freight fluctuations. It is noteworthy that these considerations motivated two Congresses, 45 years apart. Alexander Committee Report (H.R. Doc. 805, 63rd Cong., 2d Sess. (1914) 295-303, 416-419); Report of the House Committee on Merchant Marine and Fisheries on H.R. 6775 (H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) 1-7); Report of the Senate Commerce Committee on H.R. 6775 (S. Rep. No. 860, 87th Cong., 1st Sess. (1961) 4-11).

In 1916 the congressional decision was that conference agreements among ocean carriers should be lawful. In 1961 the decision was that conferences should be reinforced against the destructive effects of cut-rate non-conference competition by permission to use the contract rate system under appropriate statutory and

administrative safeguards. Sec. 14b of the Shipping Act, added by P.L. 87-346, 75 Stat. 762, 46 U.S.C. §813b. The purpose of the 1961 legislation is unmistakable. The title of the Act was deliberately amended during the process of enactment so that it would read:

> "To amend the Shipping Act, 1916, as amended, to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, and for other purposes."

The decision below points the way to utter frustration of this carefully stated Congressional purpose. Its effect is that any person, be he a carrier, nominee or a complete stranger to the transaction, may, if he is named as shipper on the bill of lading, be entitled to a contract and entitled to ship at the contract rate the goods of merchants who do not sign contracts. Any non-contract shipper would be able to get all the benefits realized by a contract shipper, *i.e.*, the contract rate, stability of rates and dependability of service, without the necessity of signing a contract.

The congressional purpose in legalizing the contract rate system and providing for various inducements to a shipper to sign such a contract including, of course, the differential, or spread, between the contract and the non-contract rates would be completely nullified. This decision destroys the major consideration for the discount from non-contract rates which is, of course, the merchant's undertaking of exclusive patronage. If this decision is allowed to stand, cut rate non-conference carriers could sign conference shippers' contracts and assure merchants in the trade that they

would carry the merchants' cargoes at cut rates or, when their own vessels were not available, that they would rebook the cargo on conference vessels at contract rates without the necessity for the merchants to undertake the contract obligations.

Under such circumstances the merchants themselves would hardly be expected to sign conference contracts; and the stability of ocean freight rates which was the objective of P.L. 87-346 would be a will o' the wisp.

The loophole in contract rate systems carved out by the decision below is available not only to competing carriers but also any person who is willing to ship in his name goods which he does not own. A livelihood might be derived from nothing more than lending a name to non-contract shippers in return for a portion of the freight money saved by enjoyment of the contract rates without undertaking the contract obligations.

The importance of a proper resolution of this question for the future operation of contract rate systems is underscored by the FMC's publication (28 F.R. 74, January 3rd, 1963) of revised proposed "Rules Governing Contract Rate Systems in the Foreign Commerce of the United States". To the Rules, the FMC appended a form of shipper's contract which it considered conformable to the new law (28 F.R. 78-80). Article 2(d) of FMC's proposed contract provides:

> "(d) Merchant warrants that it will not permit and goods to be transported under this agreement at the contract rates herein provided on behalf of any interest which is not bound by a Merchant's Rate Agreement with the Conference."

This provision, we submit, is identical in purpose and effect to Article 11 of the Far East Conference shipper's contract, which was in use in August, 1952. That purpose and that effect would be to preclude an Isbrandtsen, whether or not he was a contract shipper and regardless of the appearance of the shipping documents, to get the contract rate for the transportation of cargo transported "on behalf of any interest [*e.g.*, Kempner] which is not bound by a Merchant's Rate Agreement with the Conference".

If, however, the decision below stands as authority for the effect to be given to such contract provisions, the national policy in favor of "*effective* and fair dual rate contracts" will be set at naught.

II. The Decision Below In Sustaining An Award Of Reparation Without Proof Of Competitive Market Injury, Is Inconsistent With Decisions Of This Court.

Your petitioner urges that the decision below is in direct conflict with the holdings of this Court in *I.C.C. v. United States*, 289 U.S. 385 (1933), and *Penn. R. Co. v. International Coal Co.*, 230 U.S. 184 (1913). The cited cases set the standard for determination of the question of reparation to be awarded for injury suffered by reason of unlawful discrimination by transportation companies. In this case respondent Isbrandtsen could not collect damages for anything but discrimination.

At the material times, the Shipping Act did not contain a provision for damages for an overcharge in foreign trade. It was not until P.L. 87-346 added §18 (b) (3) on October 3, 1961, that there was any au-

thority for the recovery of overcharges in foreign commerce.

In *I.C.C.* v. *United States*, *supra*, this Court stated, with respect to a shipper seeking reparation for unjust discrimination under the Interstate Commerce Act (289 U.S. at 390-391):

> "He is to recover the damages that he has suffered, which may be more than the preference or less (*Penn. R. Co.* v. *International Coal Co.*, *supra*, pp. 206, 207), but which, whether more or less, is something to be proved and not presumed. *Ibid.*, p. 204. 'Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted.' *Keogh* v. *C. & N.W. Ry. Co.*, *supra*, p. 165. The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.
>
> "The answer to that question is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula. If by a reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price [citing cases], damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

The court below held that damages for discrimination in the amount of the difference between freight at the contract rate and freight at the non-contract rate had been proved without any evidence of the type of competitive market loss clearly required by the decisions of this Court. It thus created uncertainty as to the standard of proof and the measure of damages in unjust discrimination cases under the Shipping Act. These important issues should, in the public interest, be settled by this Court.

III. The Decision Below Introduces An Untenable Theory Of Unjust Discrimination.

The FMC found that a few months before the shipments here involved, at a time when Isbrandtsen also had no Far East Conference shipper's contract, four carriers, members of the Conference, other than SML, transported merchandise other than cotton for Isbrandtsen at contract rates. There was no finding—and the record contains no basis for any finding—that the circumstances surrounding those shipments were comparable to the circumstances attendant upon the shipments which are the subject of this litigation.

Nevertheless, the FMC held that SML, which applied the non-contract rate for cotton to shipments of cotton by a non-contract shipper—neither Isbrandtsen nor Kempner, the owner of the cotton, was a contract shipper—had unjustly discriminated against Isbrandtsen in violation of §17 of the Shipping Act because other Conference carriers had accorded contract rates to other shipments of Isbrandtsen. The FMC thus failed to apply the axiom of regulatory law that a holding of unjust discrimination must be supported by findings that the party discriminated against had

been placed at a disadvantage *vis-a-vis* a similarly situated competitor. Manifestly, SML's treatment of Isbrandtsen with respect to cotton could not have placed Isbrandtsen at a competitive disadvantage with Isbrandtsen as the shipper of other merchandise under undisclosed circumstances at an earlier date.

The Court below refused to disturb the FMC's unprecedented and illogical holding of unjust discrimination in violation of §17 of the Shipping Act. The Court placed its refusal on the ground that the FMC's findings were supported by substantial evidence viewing the record as a whole. The cited principle of judicial review of administrative action is correct. However, it applies to administrative findings of fact, and *not* to the legal conclusions drawn by the administrative agency on the basis of its findings. *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481, 498-499, (1958).

However, the FMC's sole basis for holding that there had been unjust discrimination was the comparison of SML's rate treatment of Isbrandtsen with the rate treatment accorded Isbrandtsen by other Conference members some months earlier. SML challenged the legal validity of that conclusion, and the Court below had a duty to rule on the validity of the FMC's holding *as a matter of law*. Section 2 of the Review Act of 1950, 64 Stat. 1129, as amended (5 U.S.C. §1032); Section 10(e)(B)(1) of the Administrative Procedure Act, 60 Stat. 243 (5 U.S.C. §1009).

We submit that the action of the Court below in leaving the FMC's erroneous holding undisturbed, raises two questions of importance far beyond the confines of the case at bar. First, there is the matter of the proper conception of the duty of a Court re-

viewing an administrative determination. This is a question of importance to all industries subject to Federal administrative regulation and to the vast public served by them. Secondly, there is the matter of the proper factual predicate for a legal conclusion that a regulated carrier has committed unjust discrimination. This question clearly affects all carriers subject to FMC regulation and the public which they serve, and could, by extension, affect all industries subject to prohibitions against unjust discrimination, and their patrons.

IV. The Decision Of The Court Below On The Issue Of Interest Creates A Conflict With A Recent Decision Of The Same Court, Which Should Be Resolved Because Of The Central Importance Of The Court Of Appeals For The District Of Columbia Circuit In Reviewing FMC Decisions.

On April 26, 1962, while the present case was pending, the Court of Appeals for the District of Columbia Circuit decided *Flota Mercante Grancolombiana* v. *Federal Maritime Com'n*, 112 App. D.C. 302, 302 F. 2d 887 (D.C. Cir. 1962). The court there held that awarding of prejudgment interests on damages for discrimination was within the discretion of the Board (FMC). The court stated (302 F. 2d at 894):

> "*The Merits.* In No. 16,366, Consolo seeks additional reparations. He questions the Board's denial of prejudgment interest. But the cases cited by Consolo, such as Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 46 S. Ct. 73, 70 L. Ed. 242 (1925), only demonstrate that recovery of interest is not barred, not that the granting of interest is mandatory. We find

that the Board did not abuse its discretion in denying interest. (Cases Cited)"

This decision seemed to settle the proposition that the grant or denial of an award of prejudgment interest in discrimination cases is within the FMC's discretion. However, in the decision below the court held that the action of the FMC in denying interest in a discrimination case was improper and proceeded to award interest without finding that the FMC had abused its discretion.

Many steps in the instant case were delayed for long periods in the expectation that the proceedings which culminated in *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481 (1958), would dispose of the issue of illegality *per se* of contract rate systems. Thus, the Board heard the oral argument in this case for the first time on February 10, 1959 and then, after the decision in *Federal Maritime Board* v. *Isbrandtsen Company*, asked for and heard a reargument on May 3, 1961, over two years later. Under the circumstances, it seems clear that the FMC did not abuse its discretion in denying prejudgment interest.

Either the FMC has discretion in awarding interest in discrimination cases or it does not. If it does have such discretion, then the only way in which a determination could be reversed is by the finding of an abuse of discretion. If it does not have such discretion, then the *Flota Mercante* case was wrongly decided. The conflict between *Flota* and the present case should, we contend, be resolved by reversal of the present decision, which only invites review proceedings in all reparation cases in anticipation that the court will substitute its discretion for that of the FMC.

We submit that it is desirable in the public interest that this court settle the question of awarding of interest in discrimination cases. This is essential because the preponderance of cases from the FMC are heard by the Court of Appeals for the District of Columbia Circuit.

V. The Court Below Found, Without Warrant In The Record Or In The FMC's Report, That SML Had Acted In Bad Faith.

In footnote 5 to its opinion, the Court below attributed to the FMC a finding that SML had acted in bad faith. The Court, referring to litigation between Isbrandtsen and conferences other than this Conference as the apparent motive, stated that it agreed with the FMC (App. A, p. 4).

No issue before the FMC turned on a question of good or bad faith, and its report is devoid of any finding on the subject (J.A. 119-153). By the same token, no issue before the Court of Appeals turned on the question of good or bad faith, and any mention thereof was gratuitous.

It is impossible to read the opinion below without reaching the conclusion that this inference colored the entire decision. So the Court attributed SML's refusal to carry cotton at contract rates to the great volume of litigation between Isbrandtsen and various conferences attempting to test the illegality *per se* of the dual rate system. The Court did not once consider that it was the obligation of SML, as a member of the Conference, to charge rates strictly in accordance with its tariffs. The court clearly overlooked Exhibit 22 (J.A. 98), a communication which informed SML

prior to the collection of freight on these shipments, that it was the opinion of the Conference Chairman that the non-contract rate must be applied. It is clear that SML was acting in good faith toward its Conference obligations, and not in bad faith toward Isbrandtsen.

So, likewise, the Court's reversal of the FMC in the disallowance of prejudgment interest can be accounted for only by this unjustified attribution to SML of bad faith.

We urge that the Court's action in interpolating this unwarranted aspersion upon a litigant is not only prejudicial error; it may also constitute such a departure from the accepted and usual course of judicial proceeding as to warrant consideration by this Court under paragraph 1(b) of Rule 19 of the Rules of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

New York, N.Y.,
May 7th, 1963.

HERMAN GOLDMAN,
ELKAN TURK,
ELKAN TURK, JR.,
SOL D. BROMBERG,
120 Broadway,
New York 5, N.Y.,
Counsel for Petitioner.

APPENDIX A

Opinion and Order

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,667

STATES MARINE LINES, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

No. 16,671

ISBRANDTSEN COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION (formerly FEDERAL MARITIME BOARD) and UNITED STATES OF AMERICA,

Respondents,

STATES MARINE LINES, INC.,

Intervenor.

Petitions for Review of an Order of the Federal Maritime Board

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Decided January 3, 1963

Mr. Elkan Turk, Jr., with whom *Mr. Elkan Turk* was on the brief, for petitioner in No. 16,667 and intervenor in No. 16,671.

Mr. Richard W. Karras, with whom *Mr. James N. Jacobi* was on the brief, for petitioner in No. 16,671.

Mr. Paul D. Page, Jr., Attorney, Federal Maritime Commission, with whom *Mr. James F. Pimper*, General Counsel, Federal Maritime Commission, was on the brief, for respondent Federal Maritime Commission. *Messrs. Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Thomas D. Wilcox*, Attorney, Federal Maritime Commission, also entered appearances for respondent Federal Maritime Commission.

Mr. Joel E. Hoffman, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Irwin A. Seibel*, Attorney, Department of Justice, was on the brief, for respondent United States.

Before WILBUR K. MILLER, DANAHER and WRIGHT, *Circuit Judges*.

WRIGHT, *Circuit Judge*: States Marine Lines, Inc. (SML) and Waterman Steamship Corporation (Waterman) are members of the Far East Conference of steamship lines. This conference operates a dual rate contract system in the cotton trade originating from the Gulf ports. Briefly, this system establishes one tariff for the shipment of cotton for those shippers who contract to ship exclusively on conference member lines, and another tariff, four dollars per ton, or approximately 10 per cent, higher, for shippers who do not.

Isbrandtsen is a common carrier by water in foreign commerce in addition to being a merchant in international trade. In 1952, Isbrandtsen, as a carrier, contracted with H. Kempner, a non-conference cotton

shipper, to transport certain raw cotton belonging to Kempner from Gulf ports to Japan. Isbrandtsen anticipated chartering a vessel to haul the cotton, but when the time for carriage arrived, no non-conference vessels were available. Isbrandtsen then contacted SML and Waterman to arrange shipment on those lines. Not being at that time under a conference contract,[1] to obtain the lower rate Isbrandtsen offered to sign one. The offer was refused. Under protest, Isbrandtsen shipped the cotton at the higher rate and promptly filed a claim[2] with the Federal Maritime Board alleging, inter alia, that the denial of the contract constituted unjust discrimination in violation of Section 17 of the Shipping Act, 1916.[3] The Board sustained Isbrandtsen's claim and awarded damages in the amount of the differential between the contract and non-contract rates, but allowed interest only from sixty days after the date of the award. The case is now before us on cross-appeals,[4] SML contesting the finding of discrimination and the measure of damages, and Isbrandtsen contesting the limitation on interest. Waterman did not appeal.

SML contends that the Board's finding that SML and Waterman refused to allow Isbrandtsen to execute a shipper's contract is not supported by substan-

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[1] Isbrandtsen had been under conference contract from 1946 to 1948.

[2] Pursuant to 39 Stat. 736, 46 U.S.C. §821

[3] 39 Stat. 728, 46 U.S.C. §816

[4] Administrative Orders Review Act of 1950, 64 Stat. 1129, as amended 68 Stat. 961, 5 U.S.C. §1032

tial evidence.[5] In the alternative, SML asserts that, since Isbrandtsen was neither the shipper nor the owner[6] of the particular cotton involved here, it would not have been entitled to the contract rates even if Isbrandtsen had been given a contract. These determinations being findings of fact, our scope of review is restricted to determining whether the findings of the agency are supported by substantial evidence viewing the record as a whole.[7] We conclude that the Board's findings were so supported.

Relying upon *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), SML contends that Isbrandtsen has not properly established its damages since it proved only the rate differential. In *Eden*, a shipper claimed reparations alleging unjust discrim-

[5] SML admits that Isbrandtsen sought a contract. Unfortunately, according to SML, it had no contract forms available at the time. The Board found that SML acted in bad faith. We agree. It appears that the competition of Isbrandtsen in its carrier capacity was a major factor in the decision of the conferences to adopt these dual rate systems. Isbrandtsen has repeatedly challenged their legality in the courts. See, e.g., *Isbrandtsen Company v. United States*, 99 U.S. App. D.C. 312, 239 F. 2d 933 (1956), affirmed sub nom. *Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F. 2d 51, (1954), cert. denied sub nom. *Federal Maritime Board v. United States, et al.*, 347 U.S. 990 (1954); *Isbrandtsen Co. v. United States*, S.D. N.Y., 96 F. Supp. 883 (1951), affirmed by equally divided Court sub nom. *Federal Maritime Board v. United States, et al.*, 342 U.S. 950 (1952).

[6] Isbrandtsen is described as the shipper by SML on its own shipping documents. And nowhere in those documents or on the conference contract form is the shipper required to be the owner of the goods shipped. Moreover, in the circumstances of this case, Isbrandtsen was neither agent nor broker for Kempner. Restatement, Agency (Second) §2; Mechem, Agency §2362 (2d Ed. 1914).

[7] 60 Stat. 243, 5 U.S.C. §1009(e); *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474 (1951).

ination under Sections 16 and 17[8] of the Act. The Board found unjust discrimination but rejected the rate differential as the measure of damages:

> "* * * [T]he fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief. We think it is clear that proof of unlawful discrimination within the meaning of the act, by showing the charging of different rates from shippers receiving the same service, does not, as a matter of course, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation." *Id.* at 47-48.

Assuming that that case sets forth the correct measure of damages on the facts there involved,[9] reliance upon it here is misplaced. That case merely holds that proof of the differential does not "as a matter of course" establish the damages. It does not hold that the differential can never be the measure of damages. In this case, unlike *Edson*, the usual maritime variables do not appear. Nor was other shipping available. Here, as shown by the record, Isbrandtsen received a flat fee from Kempner for handling the shipment. The differential, therefore, represented the exact amount of its actual damages.

Finally, Isbrandtsen appeals the denial of interest on the damages. Generally, interest is granted on

[8] 39 Stat. 734, 46 U.S.C. §§ 815 and 816.

[9] There has been no judicial determination of the correct measure of damages under the Shipping Act. Supreme Court decisions in similar situations have not been consistent. Compare *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412 (1915), and *I.C.C. v. United States*, 289 U.S. 385 (1933). See Annotation, 77 L. Ed. 1279.

transportation overcharge claims from the date of payment of the overcharge.[10] While the claim in suit technically does not involve an overcharge, nevertheless, it has been the Board's practice to award interest under these circumstances.[11]

The Board justifies its failure to do so here on the ground that Isbrandtsen did not prove the exact dates on which its claims for damages accrued. The evidence shows that all transactions, including payment of the freight charges, took place during the period August 3 to September 18, 1952. Isbrandtsen has waived interest accrued prior to the filing of its complaint, November 3, 1952. Interest should be granted from that date.

So ordered.

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[10] *L. & N. R.R. v. Sloss-Sheffield Co.*, 269 U.S. 217, 238-239 (1925); *Wabash Ry. Co. v. Keasey*, 8 Cir., 274 F. 909 (1921), cert. denied, 257 U.S. 660 (1921); *Arkadelphia Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 147 (1919).

[11] *Roberto Hernandez, Inc. v. Arnold Bernstein S.S. M.B.H.*, 2 U.S.M.C. 62 (1939); *American Tobacco Co. v. Com. Gen. Transatlantique*, 1 U.S.S.B. 97 (1925), affirmed, 2 Cir., 31 F.2d 663 (1929), cert. denied, 280 U.S. 555 (1929).

APPENDIX B

The Relevant Parts of the Statutes involved

(Extracted from U.S. Code)

I. Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. §§801, *et seq.*:

Section 17, 46 U.S.C. §816:

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge."

. . . .

Section 22, 46 U.S.C. §821:

"Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by

the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation."

* * *

11. Review Act of 1950, 64 Stat. 1129, as amended, 5 U.S.C. §1031 *et seq.*:

Section 10, 5 U.S.C. §1040:

"An order granting or denying an interlocutory injunction under section 1039 (b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in Section 1254 (1) of Title 28: *Provided*, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254 (1) of Title 28: *Provided further*, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254 (2) of Title 28, regarding certification, and of section 2101 (e) of Title

28, regarding stays, shall also apply to proceedings under this chapter."

III. Title 28 U.S.C. Judiciary and Judicial Procedure:

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *